

LEGAL NOTICE
Notice of Proposed Rulemaking
Public Hearing

Pursuant to Chapter 91, Hawaii Revised Statutes (HRS), notice is hereby given that the Department of Labor and Industrial Relations (DLIR), Hawai'i Civil Rights Commission (HCRC), will hold a public hearing to amend Title 12-46, Subchapter 9, Hawaii Administrative Rules (HAR) relating to disability discrimination in employment. The hearing will be held on the following date, time and location:

HONOLULU, OAHU	November 22, 2011 4:00 – 6:00 p.m. Keelikolani Building 830 Punchbowl Street Rooms 310, 313 and 314 Honolulu, Hawai'i 96813
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The proposed amendments to HAR 12-46 Subchapter 9 are to minimally conform state law protections against disability discrimination in employment to the federal Americans with Disabilities Act Amendments Act of 2008, P.L. 110-325 (ADAAA) and its implementing regulations, 29 C.F.R. Part 1630, issued by the Equal Employment Opportunities Commission (EEOC). Pursuant to Act 30, Sp. 2009 and Act 139, L. 2010, the legislature directed the HCRC to minimally conform its administrative rules to the ADAAA within one year after the EEOC publishes its final regulations interpreting the ADAAA. The EEOC issued its final regulations on March 25, 2011.

The ADAAA was enacted to correct certain U.S. Supreme Court decisions that narrowly construed the definition of "disability" under the Americans with Disabilities Act (ADA). Therefore, the purpose of the ADAAA was to clarify certain terms used to define "disability" so that the determination of whether a person has a disability would not demand extensive analysis, and to make it easier for people with a wide range of impairments to establish coverage under the act. This shifts the focus of cases brought under the ADA from whether a person meets the definition of "disability" to whether covered entities have complied with their obligations and whether discrimination has occurred. The key terms revised in the ADAAA were: "physical or mental impairment", "being regarded as having such an impairment", "major life activities", and "substantially limits". Changes were also made to provisions regarding reasonable accommodations, permitted activities, and defenses.

Accordingly, the proposed Hawaii Administrative Rule changes also amend certain terms used to define "disability" under H.A.R. §12-46-182 and certain provisions regarding disability discrimination, failure to make reasonable accommodation, permitted activities, and defenses under H.A.R. §§12-46-183, -187, -192 and -193.

The proposal rule changes will affect small businesses that have less than 15 employees who would otherwise not be subject to the requirements of the ADAAA. The main burden will be on small businesses to engage in an interactive process to determine whether they can make accommodations requested by an applicant or employee with a disability, or whether the accommodations pose an undue hardship on the operation of their businesses

The proposed changes to HAR 12-46 Subchapter 9 include the following:

1. General provisions

Section 12-46-181 is amended to reflect that Acts 30 and 139 were passed in 2009 and 2010, respectively, to minimally conform state law to the ADAAA and to direct the HCRC to amend its administrative rules accordingly

2. Definition of “being regarded as having such an impairment”

The definition of “being regarded as having such an impairment” in H.A.R. §12-46-182 is amended so that it no longer requires a showing that an employer perceived the person to be substantially limited in a major life activity. Therefore an applicant or employee who is subjected to a prohibited action because of any actual or perceived impairment that is not transitory and minor will meet the “regarded as” definition of disability. “Transitory” is defined as lasting or expected to last six months or less. Two new examples are also provided.

3. Definition of “disability”

The definition of “disability” in H.A.R. §12-46-182 is amended to reflect the above mentioned change in the “regarded as” prong of the definition.

4. Definition of “major life activities”

The definition of “major life activities” in H.A.R. §12-46-182 is expanded to include two non-exhaustive lists covering basic activities that most people in the general population can perform as well as major bodily functions

5. Definition of “physical or mental impairment”

The definition of “physical or mental impairment” in H.A.R. §12-46-182 is expanded to include certain impairments listed in the ADAAA and EEOC regulations that were not in the rules and to clarify that pregnancy-related impairments that substantially limit a major life activity or are covered under the “record” or “regarded as” prongs may be disabilities.

6. Definition of “qualified”

The definition of “qualified” in H.A.R. § 12-46-182 is slightly amended to eliminate use of the term “qualified individual with a disability” consistent with the ADAAA and EEOC regulations that eliminate that term.

7. Definition of “reasonable accommodation”

The definition of “reasonable accommodation” in H.A.R. §12-46-182 is amended to include modifications or adjustments for employees with impairments that no longer substantially limit major life activities to attend follow-up or monitoring appointments.

8. Definition of “substantially limits”

The definition of “substantially limits” in H.A.R. §12-46-182 is amended to clarify that a limitation need not significantly or severely restrict a major life activity and to clarify the terms “condition”, “manner” or “duration” which may be considered. The definition is also amended to include consideration of non-ameliorative effects of mitigating measures, impairments that are episodic or in remission if they would substantially limit a major life activity when active, and multiple impairments that combine to substantially limit a major life activity.

9. Discrimination prohibited

H.A.R. §12-46-183 is slightly amended to delete the language “qualified person with a disability” consistent with the ADAAA and EEOC regulations that eliminate that term.

10. Reasonable accommodations

H.A.R. §12-46-187 is amended to delete the term “qualified person with a disability” and to clarify that a covered entity is not required to make a reasonable accommodation to a person who is solely regarded as having a disability.

11. Specific activities permitted

H.A.R. § 12-46-192 is amended to add the provision clarifying that while religious institutions may give preference in employment to individuals of that religion, or may make a selection calculated to promote the religious principles of that institution, these entities may not discriminate on the basis of disability against an individual who meets such religious criteria.

12. Defenses

H.A.R. §12-46-193 is amended to include the defense to a person claiming coverage under the "regarded as" definition of disability that the impairment is or would be transitory and minor.

A copy of the proposed rule amendments will be made available for public viewing from the first working day that the legal notice appears in the Honolulu Star-Advertiser, Hawaii Tribune-Herald, West Hawaii Today, The Maui News and The Garden Island, through the day the public hearing is held, from Monday – Friday between the hours of 8:00 a.m. – 4:00 p.m. at the Hawai'i Civil Rights Commission, 830 Punchbowl Street, room 411, Honolulu, Hawai'i 96813.

A copy of the proposed rules may also be viewed at: <http://hawaii.gov/labor/hcrc>. Copies can also be mailed to any interested party, upon written request to the Hawai'i Civil Rights Commission, 830 Punchbowl Street, room 411, Honolulu, Hawai'i 96813. Please enclose a self-addressed stamped 9-1/2" x 4-1/8" (size 10) envelope with \$0.64 postage.

Interested persons may present written or oral testimony at the time of the public hearing. All persons wishing to submit written testimony are requested to submit 7 copies of their written testimony before the public hearing to the Hawai'i Civil Rights Commission, 830 Punchbowl Street, room 411, Honolulu, Hawai'i 96813, or 7 copies may be submitted to the presiding officer at the public hearing. The public hearing will be continued, if necessary, to a later time, date, and/or place announced at the scheduled hearing.

Interested persons unable to attend the public hearing shall submit 7 copies of their written testimony before the public hearing to the Hawai'i Civil Rights Commission, 830 Punchbowl Street, room 411, Honolulu, Hawai'i 96813. All submissions for the record must be received at or prior to the scheduled public hearing.

The public hearing is accessible for individuals with disabilities. Auxiliary aids and services are available upon request by calling the Hawai'i Civil Rights Commission offices at: (808) 586-8659 (voice), (808) 586-8692 (TDD). A request for an auxiliary aid or service should be made no later than 10 working days prior to the public hearing.

Dated: September 20, 2011



DWIGHT TAKAMINE

Director

Department of Labor and Industrial Relations

Amendments to Chapter 12-46 Subchapter 9,
Hawaii Administrative Rules

1. Section 12-46-181, Hawaii Administrative Rules, is amended to read as follows:

"§12-46-181 General provisions. Chapter 378, HRS, prohibits any employer or other covered entity from discriminating in employment against individuals or persons because of a disability. ~~[This subchapter reflects the protections which existed under state law protecting persons with handicapped status and is declaratory of existing law. In 1992, the Legislature replaced the term "handicapped status" with disability but retained the same definition.]~~ Persons with a disability are entitled to equal employment opportunities as are available to persons without a disability. In 2009 the Legislature passed Act 30 and in 2010 the Legislature passed Act 139, which directed the commission to adopt administrative rules to conform, at minimum, to the definitions contained in the Americans with Disabilities Act Amendments Act (ADAAA), P.L. 110-325. Consistent with the ADAAA and its implementing regulations, the definition of disability is to be construed broadly in favor of expansive coverage to the maximum extent permitted by Chapter 378, HRS. The primary object of attention in cases brought under Chapter 378 and these administrative rules should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the person meets the definition of disability. The determination of whether a person has a disability should not demand extensive analysis. The examples are used to provide guidance to the public and only illustrate the particular point or principle to which they relate in the rules. They should not be taken out of context as statements of policy that would apply in different circumstances. To the greatest extent possible, the commission will interpret the rules consistent with the examples, however, the commission shall review each case on an individual basis in an effort to seek an equitable application of this subchapter." [Eff 8/18/94; am] (Auth: HRS §368-3) (Imp: HRS §§378-1, 378-2)

2. Section 12-46-182, Hawaii Administrative Rules, is amended by amending the definition of "being regarded as having such an impairment" to read:

"Being regarded as having such an impairment" means[+
~~(1) Has a physical or mental impairment that does not substantially limit major life activities but is treated or considered by an employer or other covered entity as being so limited;~~]

is subjected to a prohibited action because of any actual or perceived physical or mental impairment that is not both transitory and minor, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity. For purposes of this subchapter, "transitory" is defined as lasting or expected to last six months or less.

Example:

~~[An employee has mild hypertension which is not substantially limiting. If the employer reassigns the employee to less strenuous work because of a belief that the employee is not able to do the regular work, the employer regarded the individual as having a substantially limiting impairment.]~~

If an employer refuses to hire an applicant because of skin graft scars, the employer has regarded the applicant as a person with a disability.

Example:

~~[An individual has a back condition, such as spondylolysis, which is not substantially limiting. If an employer does not hire the individual because of concerns of future risk of injury, the employer regarded the individual as having a substantially limiting impairment.]~~

If an employer terminates an employee because he has cancer, the employer has regarded the employee as a person with a disability.

~~[(2) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others towards such impairment; or~~

Example:

~~— An employee has a prominent facial scar or disfigurement which is not substantially limiting. If the employer changes the duties of the employee because of the negative reactions of customers or co-employees, the employer regarded the individual as having a substantially limiting impairment.~~

- ~~(3) Has none of the impairments covered in the definition of mental or physical impairments but is treated or considered by an employer or other covered entity as having a substantially limiting impairment.~~

Example:

~~— An employee, who does not have HIV, is discharged by the employer because of false rumors that the employee has HIV. Even though the employee has no impairment, the employer regarded the individual as having a substantially limiting impairment.] "~~

3. Section 12-46-182, Hawaii Administrative Rules, is amended by amending the definition of "disability" to read:

"Disability" means:

- (1) With respect to a person:
 - (A) Having a physical or mental impairment which substantially limits one or more major life activities;
 - (B) Having a record of such an impairment; or
 - (C) Being regarded as having such an impairment[-], as described in these rules.
- (2) Disability does not include transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, or psychoactive substance use disorders resulting from current illegal use of drugs."

4. Section 12-46-182, Hawaii Administrative Rules, is amended by amending the definition of "major life activities" to read:

"Major life activities" means:

(1) ~~[basic]~~Basic activities ~~[and functions which the average person]~~ that most people in the general population can perform with little or no difficulty, including, but not limited to, caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, reading, sitting, standing, lifting, reaching, eating, sleeping, bending, concentrating, thinking, communicating, interacting with others, and working[-]; and

(2) The operation of a major bodily function, including, but not limited to, functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genito-urinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes the operation of an individual organ within a body."

5. Section 12-46-182, Hawaii Administrative Rules, is amended by amending the definition of "physical or mental impairment" to read:

"Physical or mental impairment" means:

(1) In general:

(A) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, immune, circulatory, hemic and lymphatic, skin, and endocrine; or

(B) Any mental or psychological disorder, such as an intellectual disability (formerly termed mental retardation[-]), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(2) Physical or mental impairments include, but are not limited to, such conditions, diseases, and infections as: orthopedic, visual, speech, and

hearing impairments; deafness; blindness;
partially or completely missing limbs; mobility
impairments requiring the use of a wheelchair;
autism; cerebral palsy; epilepsy; muscular
dystrophy; multiple sclerosis; AIDS; HIV
infection or seropositivity; cancer; heart
disease; diabetes; alcoholism; intellectual
disability (formerly termed mental
retardation[+]); emotional illness; specific
learning disabilities; developmental
disabilities; bipolar disorder; post traumatic
stress disorder; obsessive compulsive disorder;
schizophrenia; and [manic]major depression.

- (3) Physical or mental impairments do not include physical, psychological, environmental, cultural, or economic characteristics, such as, but not limited to, eye or hair color; left-handedness; height, weight, or muscle tone that do not result from a physiological disorder; a characteristic predisposition to illness or disease; pregnancy; personality traits such as poor judgment or a quick temper when they are not symptoms of a mental or psychological disorder; poverty; a lack of education or illiteracy; a prison record; and sexual orientation. However, a pregnancy-related impairment that substantially limits a major life activity is a disability under the first prong of the definition. Alternatively, a pregnancy-related impairment may constitute a "record of" a substantially limiting impairment, or may be covered under the "regarded as" prong if it is the basis for a prohibited employment action and is not transitory and minor.

- (4) Drug use shall be considered a mental or physical impairment when a person:
- (A) Has successfully completed a supervised drug rehabilitation program and is no longer engaging in current illegal use of drugs;
 - (B) Has otherwise been rehabilitated successfully and is no longer engaging in current illegal use of drugs;
 - (C) Is participating in a supervised rehabilitation program, a recognized self-help program, or an employee assistance program, and is under the supervision of a licensed health care professional for the

- treatment of drug use and is no longer engaging in current illegal use of drugs; or
- (D) Is erroneously regarded as engaging in such use, but is not engaging in such use."

6. Section 12-46-182, Hawaii Administrative Rules, is amended by amending the definition of "qualified person with a disability" to read:

"Qualified" ~~[person with a disability]~~ with respect to a person with a disability means a person with a disability who satisfies:

- (1) The requisite skill, experience, education, and other job-related qualification standards of the employment position such person holds or desires; and
- (2) Who, with or without reasonable accommodation, can perform the essential functions of such position."

7. Section 12-46-182, Hawaii Administrative Rules, is amended by amending the definition of "reasonable accommodation" to read:

"Reasonable accommodation" means:

- (1) In general:
 - (A) Modifications or adjustments to a job application process that enable an ~~[qualified]~~ applicant with a disability to be considered for the position such ~~[qualified]~~ applicant desires;
 - (B) Modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a ~~[qualified]~~ person with a disability to perform the essential functions of that position; ~~[or]~~
 - (C) Modifications or adjustments that enable a covered entity's employee with a disability to enjoy the same or equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities~~[-]~~; or
 - (D) Modifications or adjustments to

schedules or leave policies to enable an employee with record of an impairment that previously substantially limited, but no longer substantially limits a major life activity, to attend follow-up or monitoring appointments from a health care provider.

- (2) Reasonable accommodation may include, but is not limited to:
 - (A) Making existing facilities used by employees readily accessible to and usable by persons with disabilities; and
 - (B) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for persons with disabilities."

8. Section 12-46-182, Hawaii Administrative Rules, is amended by amending the definition of "substantially limits" to read:

"Substantially limits" [means]:

- (1) In general [~~:(A) Unable to perform a major life activity [that the average person in the general population can perform; or]~~ means limited in the ability to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or severely or significantly restrict, a person from performing a major life activity in order to be considered substantially limiting.
~~[(B) Significantly restricted as to the condition, manner, or duration under which a person can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.]~~
- (2) The following factors [~~should~~] may be considered in determining whether a person is substantially limited in a major life activity:

- (A) The ~~[nature and severity of the impairment,]~~ condition under which the person performs the major life activity;
 - (B) The duration ~~[or expected duration of the impairment,]~~ of time it takes the person to perform the major life activity; and
 - (C) The ~~[permanent or long-term impact of, or the expected permanent or long-term impact of the impairment.]~~ manner in which the person performs the major life activity.
- ~~[(3)]~~ Temporary, non-chronic impairments of short duration with little or no long-term impact usually are not disabilities. Such non-disabling impairments may include, but are not limited to, broken limbs, sprained joints, concussions, appendicitis, and influenza.]
- ~~[(4)]~~ (3) Certain impairments such as blindness, deafness, an intellectual disability (formerly termed mental retardation), partially or completely missing limbs, mobility impairments requiring the use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, multiple sclerosis, muscular dystrophy, major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, schizophrenia, HIV infection, and AIDS ~~[are by their nature]~~ should easily be concluded to be substantially limiting.
- ~~[(5)]~~ (4) The limitation resulting from an impairment is determined without regard to mitigating measures such as medicines; ~~[or assistive or prosthetic devices.]~~ medical supplies, equipment or appliances; low vision devices; prosthetics including limbs and devices; hearing aid(s) and cochlear implant(s) or other implantable hearing devices; mobility devices; oxygen therapy equipment and supplies; use of assistive technology; reasonable accommodations; auxiliary aids or services; learned behavioral or adaptive neurological modifications; or psychotherapy, behavioral therapy or physical therapy.
- (5) Non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an individual's impairment substantially limits a major life activity.

(6) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. Examples of impairments that may be episodic or in remission include, but are not limited to, epilepsy, multiple sclerosis, cancer, hypertension, diabetes, asthma, major depressive disorder, bipolar disorder and schizophrenia.

~~[(6)]~~ (7) ~~[With respect to]~~ An impairment substantially limits the major life activity of "working" if it substantially limits ~~[(A) The term "substantially limits" means significantly restricted in the]~~ a person's ability to perform either a class of jobs or a broad range of jobs in various classes as compared to [the average person] most people having comparable training, skills, and abilities. The inability to perform a single, particular job does not constitute a substantial limitation in the major life activity of working.

Example:

A baseball pitcher who develops a shoulder injury and can no longer pitch would not be substantially limited in working because of not being able to perform the single, particular job of pitching in baseball.

Example:

A person whose job requires heavy lifting develops a disability that prevents her from lifting more than fifty pounds and from performing not only her existing job but also other jobs that would similarly require heavy lifting. That person would be substantially limited in working because she is substantially limited in performing the class of jobs that require heavy lifting.

~~[(B) In addition to the factors listed in the definition of "substantially limits", the following factors should be considered in determining whether a person is~~

~~substantially limited in the major life activity of "working":~~

- ~~(i) The geographical area to which the person has reasonable access;~~
- ~~(ii) The job from which the person has been disqualified because of an impairment, and the number and types of jobs utilizing similar training, knowledge, skills, or abilities, within that geographical area, from which the person is also disqualified because of the impairment (class of jobs); and~~
- ~~(iii) The job from which the person has been disqualified because of an impairment, and the number and types of other jobs not utilizing similar training, knowledge, skills, or abilities, within that geographical area, from which the person is also disqualified because of the impairment (broad range of jobs in various classes).]~~

- (8) Multiple impairments that combine to substantially limit one or more major life activities can constitute a disability.
- (9) In determining whether a person has a disability under the "actual disability" or "record of" prongs of the definition of disability, the focus is on how a major life activity is substantially limited, and not on what outcomes an individual can achieve.

Example:

A person with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population."

9. Section 12-46-183, Hawaii Administrative Rules, is amended to read as follows:

"§12-46-183 Discrimination prohibited. (a) It is unlawful for an employer or other covered entity to discriminate on the basis of disability against a qualified person ~~[with a disability]~~ in regard to:

- (1) Recruitment, advertising, and job application procedures;
- (2) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;
- (3) Rates of pay or any other form of compensation and changes in compensation;
- (4) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;
- (5) Leaves of absence, sick leave, or any other leave;
- (6) Fringe benefits available by virtue of employment, whether or not administered by the employer or other covered entity;
- (7) Selection and financial support for training, including apprenticeships, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training; and
- (8) Any other term, condition, or privilege of employment, including activities sponsored by an employer or other covered entity such as social and recreational programs.

(b) The term discrimination includes, but is not limited to, the acts made unlawful in sections 12-46-184 through 191, inclusive." [Eff 8/18/94; am
] (Auth: HRS §368-3) (Imp: HRS §§378-1, 378-2)

10. Section 12-46-187, Hawaii Administrative Rules, is amended to read as follows:

"§12-46-187 Failure to make reasonable accommodation.

(a) It is unlawful for an employer or other covered entity not to make reasonable accommodation to the known physical or mental limitations of an ~~[otherwise qualified]~~ applicant or employee with a disability~~[7]~~ who is otherwise qualified, unless such employer or entity can demonstrate that the accommodation would impose an undue hardship on

the operation of its business. An employee does not have to specifically request a "reasonable accommodation", but must only let the employer know that some adjustment or change is needed to do a job because of limitations caused by a disability.

(b) To determine the appropriate reasonable accommodation, it shall be necessary for an employer or other covered entity to initiate an interactive process, after a request for an accommodation, with the ~~[qualified]~~ person with a disability in need of the accommodation. This process shall identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

(c) It is unlawful for an employer or other covered entity to deny employment opportunities to an ~~[otherwise qualified]~~ applicant or employee with a disability based on the need of such employer or entity to make reasonable accommodation to such person's physical or mental impairments.

(d) A ~~[qualified]~~ person with a disability is not required to accept an accommodation, aid, service, opportunity, or benefit which such qualified person chooses not to accept. However, if such person, after notice by the employer or other covered entity of the possible consequences of rejecting, rejects a reasonable accommodation, aid, service, opportunity, or benefit that enables the person to perform the essential functions of the position held or desired and cannot, as a result of that rejection, perform the essential functions of the position, the person will not be considered ~~[a]~~ qualified ~~[person with a disability]~~.

(e) An employer or other covered entity is not required to make a reasonable accommodation to a person who meets the definition of disability solely under the "regarded as" prong. [Eff 8/18/94; am] (Auth: HRS §368-3) (Imp: HRS §§378-1, 378-2, 378-3)

11. Section 12-46-192, Hawaii Revised Statutes, is amended to read as follows:

"§12-46-192 Specific activities permitted. (a) An employer or other covered entity:

- (1) May prohibit the illegal use of drugs and the consumption of alcohol at the workplace by all employees;

- (2) May require that employees not be under the influence of alcohol or be engaging in the use of illegal drugs at the workplace;
- (3) May hold an employee who engaged in the use of illegal drugs to the same qualification standards for employment or job performance and behavior to which the employer or other covered entity holds its other employees, even if any unsatisfactory performance or behavior is related to the employee's use of illegal drugs;
- (4) May hold an employee who is an alcoholic to the same qualification standards for employment or job performance and behavior to which the employer or other covered entity holds its other employees, even if any unsatisfactory performance or behavior is related to the employee's alcoholism, as long as reasonable accommodation, if requested, is provided for the performance of essential job functions;
- (5) May require that its employees employed in an industry subject to such regulations comply with the standards established in the regulations (if any) of federal agencies including, but not limited to, the Departments of Defense and Transportation, and of the Nuclear Regulatory Commission, regarding alcohol and the use of illegal drugs;
- (6) May require that employees employed in sensitive positions comply with the regulations (if any) of the United States Departments of Defense and Transportation and of the Nuclear Regulatory Commission that apply to employment in sensitive positions subject to such regulations; ~~and~~
- (7) May require a medical examination or inquiry, or both, as permitted in section 12-46-191, or a test or inquiry to determine the illegal use of drugs. However, this subchapter does not encourage, prohibit, or authorize an employer or other covered entity to conduct drug tests of job applicants or employees to determine the illegal use of drugs or to make an employment decision based on such test results~~(-)~~; and
- (8) If it is a religious institution or organization, or any charitable or educational organization that is operated, supervised or controlled by or in connection with a religious organization, may give preference to individuals of the same

religion, or may make a selection calculated to promote the religious principles of that religious entity. However, a religious entity may not discriminate on the basis of disability against a qualified person who satisfies the permitted religious criteria.

(b) Any information regarding the medical condition or history of any employee or applicant obtained from a test to determine the illegal use of drugs, except information regarding the illegal use of drugs, is subject to the requirements of section 12-46-191(f).

(c) Under title I of the Americans with Disabilities Act, 42 U.S.C. §12113(d)(1), the Secretary of Health and Human Services is to prepare a list, to be updated annually, of infectious and communicable diseases which can be transmitted through the handling of food. If a person with a disability is disabled by one of the infectious or communicable diseases included on this list, and if the risk of transmitting the disease associated with the handling of food cannot be eliminated by reasonable accommodation, an employer or other covered entity may refuse to assign or continue to assign such person to a job involving food handling. However, if the person with a disability is a current employee, the employer shall consider whether he or she can be accommodated by reassignment to a vacant position not involving food handling for which he or she is qualified." [Eff 8/18/94; am] (Auth: HRS §368-3) (Imp: HRS §§378-1, 378-2)

12. Section 12-46-193, Hawaii Revised Statutes, is amended to read as follows:

"§12-46-193 Defenses. An employer or other covered entity may raise defenses to an allegation of discrimination under this subchapter including, but not limited to, the following:

- (1) **Inability to perform.** It may be a defense to a charge of discrimination brought under this subchapter that a person with a disability is unable to perform an essential job function with or without a reasonable accommodation.
- (2) **Business necessity.** It may be a defense to a charge of discrimination brought under this subchapter that:
 - (A) An alleged application of qualification standards, tests, or criteria used in the

- selection of employees screens out or tends to screen out or otherwise denies a job or benefit to a person with a disability; or
- (B) A uniformly applied standard, criterion, method of administration, or policy has a disparate impact on a person with a disability or a class of persons with disabilities; and
- the challenged standard, test, criterion, method, or policy has been shown by the employer or other covered entity to be job-related and consistent with business necessity in light of the factors in the definition of job-related and consistent with business necessity; and performance of essential job functions cannot be accomplished with reasonable accommodation, as required under this subchapter.

Example:

A job applicant for a field sales representative position, who was not hired, challenges a driver's license requirement as discriminating against persons who cannot obtain licenses because of their disabilities. An employer may be able to defend by showing that driving was an essential job function, no other transportation alternative (i.e. bus or Handivan) having less adverse effects upon persons with disabilities was available; and any accommodation would cause an undue hardship because field sales representatives had to work alone.

- (3) **Bona fide occupational qualification.** It may be a defense to a charge of discrimination that an application of qualification standards, tests, selection criteria, policies, or methods of administration which is applied to a class of persons on the basis of a specified physical or mental impairment, medical condition, or disability has been shown by the employer or other covered entity to be a bona fide occupational qualification.

Example:

An employer which does not consider for employment a person with hypertension because of a policy against hiring persons with hypertension

due to safety concerns must establish that all or substantially all persons with hypertension, regardless of severity, would pose a direct threat to self or others; no reasonable accommodations are possible; and the essence of the business would be undermined if all persons with hypertension were not excluded.

- (4) **Undue hardship.** It may be a defense to a charge of not making reasonable accommodation that a requested or necessary accommodation would impose an undue hardship on the operation of the business.

Example:

An employer would not be required to make unreasonable structural changes or expensive equipment alterations if there is significant difficulty or expense based upon the factors listed in the definition of undue hardship.

- (5) **Direct threat.** It may be a defense to a charge of discrimination under this subchapter that a person with a disability posed a direct threat to the health or safety of the person or others that cannot be eliminated or reduced by reasonable accommodation.
- (6) **Specific permitted activity.** It may be a defense to a charge of discrimination that the alleged discriminatory action is specifically permitted under this subchapter or by section 378-3, HRS.
- (7) **Good faith.** If the employer or covered entity demonstrates good faith efforts, in consultation with the person with a disability who has requested an accommodation, to identify and make a reasonable accommodation that would not cause an undue hardship on the operation of the business, the employer or other covered entity may be liable for compensatory damages and other relief but would not be liable for punitive damages if the good faith offer of accommodation is found to be not reasonable.
- (8) **Claims based on transitory and minor impairments under the "regarded as" prong.** It may be a defense to a claim of discrimination by a person claiming coverage under the "regarded as" prong of the definition of disability that the

impairment is or would be transitory and minor.
A covered entity must demonstrate that the
impairment is both "transitory" and "minor."
Whether the impairment is or would be transitory
and minor is to be determined objectively. An
employer or other covered entity may not defeat
"regarded as" coverage of a person simply by
demonstrating that it subjectively believed the
impairment was transitory and minor."
[Eff 8/18/94; am] (Auth: HRS §368-3)
(Imp: HRS §§378-1, 378-2, 378-3)

13. Material, except source notes, to be repealed is bracketed and stricken. New material is underscored.

14. Additions to update source notes to reflect these amendments are not underscored.

15. These amendments to chapter 12-46 subchapter 9, Hawaii Administrative Rules, shall take effect ten days after filing with the Office of the Lieutenant Governor.

I certify that the foregoing are copies of the rules, drafted in Ramseyer format pursuant to the requirements of section 91-4.1, Hawaii Revised Statutes, which were adopted on _____ and filed with the Office of the Lieutenant Governor.

Director of Labor and
Industrial Relations

APPROVED AS TO FORM:

Hamulakam
Deputy Attorney General